No. 895

# Supreme Court of the United States

OCTOBER TERM, 1959

OTIS W. LIVINGSTON, JAMES W. CRAIN, JAMES H. SULLIVAN, J. A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS,

*versus*

THE UNITED STATES OF AMERICA, AND E. I. DU PONT DE NEMOURS AND COMPANY, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM


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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 3, of the Revised Rules of this Court, appellants submit this brief in opposition to appellees' motion to affirm.

### STATEMENT

This appeal is from a final order of a statutory three-judge district court restraining and enjoining appellants from levying and assessing South Carolina sales and use taxes from E. I. du Pont de Nemours and Company (hereinafter referred to as "du Pont") with respect to the purchase and use in South Carolina by du Pont of items of tangible personal property in carrying out its obligations as contractor with the Atomic Energy Commission (hereinafter referred to as "AEC") at its Savannah River Plant.

The majority Court held that du Pont was the "*alter ego*" of the United States, which is to say, that to tax du Pont is to tax the United States, and further holding that, under the contract between the parties, du Pont was "without hope of gain" or "risk of loss" (Jur. St. 31). District Judge Timmerman dissented holding that the taxes were properly assessable against du Pont; "an independent contractor on the Savannah River Project". (Jur. St. 50). Judge Timmerman further held that du Pont did not enter into the contract "without hope of gain, except the nominal sum of one dollar payable on final completion of the contract" (Jur. St. 50). The foregoing presents a substantial federal question.

On May 12, 1958, appellants notified du Pont that the purchases of tangible property purchased by du Pont and used by du Pont in South Carolina would be subject to the taxes. At no time have appellants attempted to tax the United States itself.

Appellees conceded that, standing alone, the provisions of the South Carolina Sales and Use Tax Act would impose the taxes (Tr. Vol. III, 68-69, 76).[1] However, appellees contended that, nonetheless, the taxes were barred by the constitutional immunity of the United States from state taxation and the Court so held.

Additionally, there is the question whether the three-judge district court should have dismissed the complaint or, in the alternative, should have retained jurisdiction but should have permitted construction by state Courts as to whether the remedial provisions of the South Carolina Sales and Use Tax Act, which particular provisions have never been construed by the South Carolina Supreme

[1] This reference here and elsewhere herein is to one of three bound volumes of the certified transcript of record and is the official stenographic transcript of the hearing before the three-judge district court on September 22, 1958.

Court, allow recovery of interest on monies paid under protest (Jur. St. 71-72).[2]

The provisions of 28 U. S. C. 1341 deny to district courts the right to enjoin and restrain the levy and collection of any tax under state law where a plain, speedy and efficient remedy may be had in state courts.[3]

This matter presents substantial federal questions in which not only the appellants but also the several states, particularly those having sales and use tax provisions, have a real interest and have exhibited such interest.

## ARGUMENT

In their motion to affirm appellees have made a factual argument and have laid emphasis upon certain facts which they would use to induce this Court to refuse to hear the appeal with plenary hearing therein. It is respectfully submitted that, in reality, this matter presents substantial questions warranting plenary consideration with briefs on the merits and oral argument for their resolution. The motion is without merit. The federal questions presented are not frivolous. They were decided in a manner in conflict with decisions of this Court and other federal courts.

As District Judge Timmerman pointed out so aptly in his dissenting opinion, it is a duty of a Court to take into consideration the reasonableness of any statement or contention made by a litigant, or in its behalf (Jur. St. 51).

Appellees have laid emphasis upon the "extraordinary" contractual relationship between AEC and du Pont (Motion to Affirm, 13). Appellants, likewise, suggest that the contract is "extraordinary" but extraordinary in that,

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[2] These remedial provisions are Sections 65-1459, 65-1466 and 65-1467 of the 1952 South Carolina Code of Laws.

[3] 28 U. S. C. 1341 provides "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

if the parties had in mind making du Pont the "*alter ego*" of the United States, as they have contended, they clearly failed to do so. Additionally, appellants point out that the undertakings, apart from the contract itself, going on at the Savannah River Plant have been considered super secret and properly so. Appellants, in the very nature of things, have had no way to know, in fact, the details of the activities. However, the reasonableness of the contentions of appellees can be carefully analyzed and that was done in the dissenting opinion of Judge Timmerman (Jur. St. 44-60).

## I

**The Court below erred in holding that Du Pont was the Agent of and the alter ego of the United States and immune from taxes.**

This finding was necessary in order to immunize du Pont from state taxation. It had to be found apart from the specific provisions of the contract itself.[1]

There are two features in connection with this contract, in this all important particular, which should be carefully noted. First, the matter of agency was not overlooked between the parties because under the specific provisions of Section 11, Article III of the definitive contract, du Pont, like with du Pont in the Hanford Project in Washington, was declared and affirmatively made agent but for one purpose only, that is, for the leasing of houses, stores and other buildings.[2] Second, it is noted that the contract between du Pont and AEC antedated, by a number of years, both the decisions in *Du Pont v. State*, dealing with the Hanford

[1] This reference is to the definitive contract between AEC and du Pont bearing Contract No. AT(07-2)-1, dated September 30, 1953, and to the previous letter contract dated October 11, 1950. These trial exhibits are a part of the certified transcript of record but have not been bound with the remainder of the record. Like appellees, we denote, for purpose of reference herein, the letter contract as Exh. P-1, and the definitive contract as Exh. P-2.

[2] Paragraph 11, page 2, Exh. P-2.

Project and also in *Kern-Limerick v. Scurlock*, which two cases, particularly the latter, would serve to guide in the all-important matter of agency status of those contracting with the Government in relation to tax immunity.[3] Thus, the guide of these cases was not in the minds of the contracting parties at the time of the execution of the contract between AEC and du Pont here. As a matter of fact, the several decisions by the Court in the field of sales and use taxes prior to *Kern-Limerick* had served to permit the imposition and collection of sales and use taxes with respect to government contractors.[4] Of course, appellants contend that the factual situation in *Kern-Limerick* is clearly distinguishable from that involved here and that the majority opinion in *Kern-Limerick* supports the position of appellants. Three present members of this Court dissented in *Kern-Limerick* and held that the test lies in where the legal incidence of the tax rests. That, in South Carolina, has been determined by the South Carolina Supreme Court in *State v. Barnes*, 66 S. E. (2d) 33, 219 S. C. 485. It is upon the seller in regard to a sales tax and upon the user, storer or consumer in relation to a use tax. As the minority said in *Kern-Limerick*:

> "We should decide today, as we did more than a decade ago, that a tax on a contractor for the goods he uses is constitutional, even though the economic burden falls on the Federal Government."

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[3] *Du Pont v. State* (1954), 44 Wash. (2d) 339, 267 P. (2d) 667 and Kern-Limerick v. Scurlock, 347 U. S. 110.

[4] *State of Alabama v. King and Boozer*, 314 U. S. 1, and *Curry v. United States*, 314 U. S. 14, were among the leading cases.

## II

**The finding by the Court below that Du Pont was supervised and controlled to the extent that it was an agent was error.**

This finding by the Court, appellants respectfully submit, is unrealistic and unreasonable when examined in the light of the specific terms of the contract. In the first place, du Pont was hired because of its peculiar and special qualifications to do the job. It is strange to assert, as appellees have done, that the AEC, which hired du Pont because of its unique qualifications and experience would supervise, control and direct the expert in this field on a man to man basis. Further, it is most unreasonable to conclude that two hundred thirty (230) AEC personnel could direct, control and supervise seven thousand (7,000) du Pont employees on such a basis. (Tr. Vol. III, 106).

Finally, in this connection, the contract terms themselves operate against such a finding. These terms, so aptly covered by Judge Timmerman, vest in du Pont much independence and exercise of judgment (Jur. St. 49-50). There, du Pont is authorized to furnish or procure the labor, materials, tools, machinery, equipment, facilities and supplies and to do all things which in du Pont's judgment are necessary and desirable. Also, du Pont was to furnish and procure architect, engineer and other services incident to the design, procurement of materials and equipment, inspection and supervision of construction of the plants. The other contract provisions, with equal clearness, denote the area of independence on the part of du Pont.

In a case arising in the eastern district of South Carolina and out of the Savannah River Project itself, *E. I. du Pont de Nemours and Company and The United States v. Lyles and Lang Construction Company* (C. C. A. 4th Cir.), 219 F. (2d) 328, Cert. denied, 349 U. S. 956, 99 L. Ed. 1280,

75 S. Ct. 882, the Circuit Court of Appeals held that the contract of the plaintiff (the subcontractor) was with defendant (du Pont), not with the United States, and the Court went on to say:

> "* * *, and defendant in making it was acting as an independent contractor, not as an agent of the government. Cf. *Carson v. Roane-Anderson Company*, 342 U. S. 232, 236, 72 S. Ct. 257, 96 L. Ed. 257; *Continental Illinois Nat. Bank & Trust Co. of Chicago v. United States*, Ct. Claims, 81 F. Supp. 596, 112 Ct. Cl. 563."

Such situation would be equally applicable here.

## III

**The Court below improperly found that the sole consideration flowing to Du Pont was the sum of one Dollar ($1.00).**

This finding is likewise respectfully submitted to be unrealistic and contrary to sound reason.

Without for one moment questioning the desire on the part of du Pont to render a service to the Government in accepting this important contractual obligation, as many others, corporations and individuals, have done in other ways, nevertheless, it is most difficult to reason that this huge, profit-making corporation, obligated to its stockholders as it is, would, for the sum of one dollar ($1.00), work for a period, up to this time of ten (10) years for a mere, ten cents (10¢) a year. Of course, the termination date has not yet been reached or made public. Therefore, the ten cents (10¢) per year may well be reduced to one cent (1¢) a year. Judge Timmerman has treated this aspect fully and carefully (Jur. St. 50-53).

As a matter of fact, it has been conceded by appellees that du Pont sold to itself items of its own manufacture, at regular retail prices, up to a total value of one million three hundred seventy-nine thousand dollars ($1,379,000).

.00), an amount surely sufficient to denote a profit to du Pont (Tr. Vol. III, 13, 115, 131-132). Of course, appellees would minimize the importance of this but the inescapable fact remains that a profit was there beyond the mere one dollar ($1.00). It is a profit making undertaking.

Above and beyond the foregoing, is the fact that, despite du Pont's avowed lack of intention to devote its efforts to the atomic energy field, the fact remains that du Pont was selected for this very job because they were experts in this very thing. Certainly, an expert would want to improve its degree of expertness, to continue to train its new personnel in the activity in which it is recognized as expert. It can hardly be seen how such training of du Pont, entirely at government expense, could have been found not to be real consideration in itself. Once again, of course, the foregoing goes to the lack of reasonableness of the finding by the Court.

There being a use under the South Carolina Sales and Use Tax Act by du Pont of the tangible personal property in the carrying out of its contractual obligations (Jur. St. 66), coupled with a consideration flowing to du Pont as fully treated hereinabove, there is for application the principles laid down in the cases of *Detroit v. Murray Corporation of America and the United States of America*, 355 U. S. 489; *United States v. Township of Muskegon and Continental Motors*, 355 U. S. 484; and *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466, which upheld the right of the taxing authority to tax the user of government owned property, the tax being upon the user and not upon the United States.

## IV

**The Court below should have refused jurisdiction to enjoin the assessment and collection of the taxes.**

Appellants respectfully submit that the Court below should have either denied jurisdiction or, in the alternative, should have retained jurisdiction pending determination by State Courts as to whether the recovery provisions of the South Carolina Sales and Use Tax Act (Jur. St. 71-72), which specific provisions have not been passed upon by the South Carolina Supreme Court, provide for interest on sales and use taxes paid under protest. The provisions of 28 U. S. C. 1341 deny to district courts the right to enjoin and restrain the levy and collection of any tax under state law where a plain, speedy and efficient remedy may be had in State Courts. The question then for the State Courts to determine is whether interest is provided under its statutes. If it is, then, under the numerous Federal decisions dealing therewith, the remedy is adequate. *Spector Motor Service v. O'Connor*, 340 U. S. 602; *Toomer v. Witsell*, 334 U. S. 385.

Appellees contend that the provisions of 28 U. S. C. 1341 do not operate to bar injunction where the Government is a party. However, it is submitted that facts make cases. Here, it is respectfully urged that it is not a matter of having to get a congressional appropriation with which to pay the taxes under protest.* Article XX of the definitive contract contains provisions with reference to payment under protest and details the contractual understanding thereabout.**

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* *City of Springfield v. United* (C. C. A. Mass., 1939), 99 F. (2d) 860, Cert. denied, 306 U. S. 650, 59 S. Ct. 592; *United States v. Rickert*, 188 U. S. 432, 444, 23 S. Ct. 478.

** (Exh. P-2, 42.)

District Judge Timmerman, in his dissenting opinion (Jur. St. 46-49), has set forth a clear treatment of the lack of jurisdiction of the Court below to issue injunction.

## CONCLUSION

The case is within the appellate jurisdiction of the Court. It presents substantial federal questions requiring plenary hearing, questions in which there is considerable interest on the part of taxing authorities generally.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the aforegoing Brief of Appellants Opposing Appellees' Motion to Affirm have been deposited in the mail in the United States [illegible] class air mail postage prepaid to the following counsel of record:

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